# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 310

PEERLESS INSURANCE COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 343 F. 2d 759. The opinion of the district court (Pet. App. A) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 6, 1965. The petition for a writ of certiorari was filed on July 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to set aside the forfeiture of a bond executed by petitioner as surety.

## RULE INVOLVED

Rule 46(f), F.R.Crim.P., provides as follows:

> (1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.
>
> (2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> (3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.
>
> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

## STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit affirming the district court's denial of its motion to set aside the forfeiture of a bail bond of $75,000 which it had executed for the defendant in the case of *United States* v. *Accardi*, in the Southern District of New York.

Accardi had been arrested on an indictment charging conspiracy to sell and distribute narcotics. He failed to appear on September 28, 1955, the trial date, and his bond was forfeited. In April, 1963, he was arrested on a presidential warrant in Italy and returned to the United States. He was subsequently convicted and sentenced to imprisonment for fifteen years.

Petitioner's motion for remission of forfeiture alleged that it had expended considerable effort in aiding the apprehension of Accardi and that the rights of the government had not been prejudiced because of Accardi's default. The affidavit of petitioner's vice president in support of the motion expressed the belief that the issuance of the presidential warrant was due in no small part to the efforts of petitioner which were detailed (R. 1-12). The affidavit further stated that at the time the bond was executed, Accardi gave petitioner mortgages on three pieces of real estate and a confession of judgment. Following the forfeiture, petitioner learned that all of Accardi's property was encumbered by substantial mortgages and government liens which were prior to petitioner's lien. Although petitioner had been assured that

Accardi's equity was worth at least $90,000, it sold its interest at public sale for $22,500. The expenses of sale and the expenses of the investigation and efforts to extradite Accardi reduced this amount to approximately $15,000 net (R. 12-14).

The government submitted the affidavit of assistant United States attorney Peter Fleming. It recited the circumstances of Accardi's arrest, flight, and forfeiture of his bond, as set forth above. It stated that between September 19 and 28, 1955, Accardi realized approximately $32,000 from the liquidation of personal assets, followed by his flight to Italy. After he was located in Italy by Interpol, his return to this country required lengthy diplomatic negotiations, because there is no extradition treaty between the two countries covering narcotics offenses. Petitioner played no part in these negotiations and neither located Accardi nor produced him for trial (R. 28-30).

Accardi's flight necessitated substantial financial outlay on the government's part for fugitive investigations in Italy, surveillance after he was located, and diplomatic negotiations which ultimately led to his return to this country. During the time of Accardi's sojourn in Italy, according to the government's information, he was a major source of supply to the heroin trade in this country, resulting in additional expense of undetermined amount to the government.

## ARGUMENT

There was obvious basis for the court's exercise of discretion in its denial of this motion. There is no indication in the opinion of the trial court, as petitioner suggests, that it was denied relief because it is a corporate bonding concern. Petitioner's liability is not based upon active misconduct on its part, but upon its contractual liability to insure against the misconduct of the person charged. *Fidelity and Deposit Co. of Maryland* v. *United States*, 47 F.2d 222 (C.A. 9). Willful breach of the obligation of the bond by the principal obligor is not measured by monetary loss to the government, nor is the fault corrected by the circumstance of subsequent apprehension and conviction. However even if these factors were relevant, it is evident that the costs to the government were substantial and that the total amount expended involved items not readily calculable (see Pet. App. 3a).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
*Attorneys.*

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